

October 24, 2007

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte Presentation***; Exclusive Service Contracts for the Provision of Video Services
in Multiple Dwelling Units; MB Docket No. 07-51

Dear Ms. Dortch:

In recent weeks the argument has been offered that prohibiting multichannel video providers (“MVPDs”) from entering into exclusive access arrangements with multi-dwelling unit buildings (“MDUs”) will particularly benefit minority households. For example, Chairman Martin recently suggested that such an action on the part of the FCC would be particularly helpful to minority households because “40% of all households headed by people of color live in apartments, compared to 27% of all households.”¹

While it may be true that 40% of all households headed by minorities live in MDUs, it does not follow that these households will benefit from the proposed Commission action. First, this argument assumes that these MDUs will actually be served by competitors, such as the Bells, once the Commission abrogates existing contracts -- an assumption that is at odds with significant marketplace evidence. Further, the evidence on the record shows that *these households will suffer a net loss* because they will lose the benefits associated with negotiated exclusive access agreements, *and* they will simultaneously lose competitive choice in the voice marketplace (the most durable monopoly communications service) and the broadband marketplace.

The primary assumption made by this line of argument is that the Bells and other new entrants will serve MDUs once the Commission abrogates existing exclusive contracts, but that assumption is belied by numerous facts. The Bells have decided, either implicitly or explicitly, not to serve many

¹ Remarks of Chairman Martin, Rainbow Push Coalition and Citizen Education Fund Media & Telecommunications Symposium (Oct. 12, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277312A1.pdf.

communities that happen to have a high population of minority and low-income households. For example, Verizon has acquired over 150 video franchises from municipalities in the Philadelphia metropolitan area. None of these communities is in Philadelphia County, a county with a sizable minority population -- according to the Census Bureau, just under 45 percent of its population is African American and just over 10 percent of its population is Hispanic -- and one which is relatively less wealthy than its neighboring counties. Three of the four counties in which Verizon has acquired video franchises are the three wealthiest counties in Pennsylvania, as measured by median household income,² and the communities represented by those franchises have an average median household income of over \$62,000. By way of contrast, Philadelphia County has a median household income of \$33,229. The median household income in Pennsylvania as a whole is \$46,259. Pennsylvania is a mandatory access state;³ exclusive access agreements do not bar Verizon's entry. The only reason Verizon is not currently serving these communities is because it has *chosen* not to serve them. There are approximately 108,000 MDU households in Philadelphia, and *exactly zero percent of them will benefit from a prospective prohibition of exclusive agreements or the abrogation of existing exclusive agreements.*

The same analysis holds true in Massachusetts, where Verizon is now serving or has a video franchise to serve about 45 communities with its FiOS cable service. Verizon serves or has a franchise to serve just over 3 percent of all the communities in Massachusetts with a median income of less than \$50,000, just over 5 percent of all the communities in Massachusetts with a median household income of between \$50,000 and \$75,000, but a staggering 33 percent of all the communities in Massachusetts with median household incomes over \$75,000. Over 76 percent of the communities Verizon serves or has a video franchise to serve in Massachusetts have a median household income of over \$75,000, but only 28 percent of all the communities in Massachusetts have a median household income of over \$75,000. Boston, which Verizon does not serve, has a median household income of \$47,974, and Massachusetts as a whole has a median household income of \$59,963. Massachusetts is a mandatory access state;⁴ exclusive access agreements do not bar Verizon's entry. The only reason Verizon is not currently serving these communities is because it has *chosen* not to serve them. There are approximately 101,000 MDU households in Boston, and *exactly zero percent of them will benefit from a prospective prohibition of exclusive agreements or the abrogation of existing exclusive agreements.*

The Commission made a conscious decision to excuse the Bell companies from serving communities with large populations of minority and low-income households.⁵ These facts suggest that Verizon has made a concerted effort to exercise that right by refraining from serving these households,

² Information is based on median household income figures that can be found on the U.S. Census Bureau's website.

³ See 68 Pa. Cons. Stat. Ann. § 250.503-B (West 2007).

⁴ See Mass. Ann. Laws ch. 166A, § 22 (LexisNexis 2007).

⁵ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101 ¶ 89 (2007) (prohibiting "unreasonable" build-out requirements).

including residents of MDUs.⁶ AT&T, for its part, has made plain in various statements to investors and others that it intends to minimize its footprint in so-called “low value” neighborhoods.⁷ Verizon may not be so incautious as to call these neighborhoods “low-value,” but it certainly treats them as such. Any suggestion that the abrogation of MDU contracts therefore will bring more competitive choice to households whom the phone companies are conspicuously avoiding requires a leap of logic that even Evel Knievel could not survive.

Furthermore, this argument fails to account for the substantial competition that already exists to serve MDUs, and the numerous benefits that MDU owners and managers negotiate for on behalf of their residents. When the Commission examined this issue in 2003, it recognized that consumers in MDUs can benefit from exclusivity in various ways, and decided that, on balance, there was no need for the Commission to take action on the issue.⁸ Since that time, nothing has changed to suggest that consumers are not receiving benefits that result from exclusivity. Despite some arguments that exclusive agreements are necessarily anti-competitive,⁹ or that existing cable operators are using exclusives to ward off competition,¹⁰ the record is clear that exclusives do have significant pro-

⁶ Philadelphia and Boston are only two of the many large metropolitan areas Comcast serves, but they serve as important examples of a trend that is particularly relevant to this proceeding. Comcast serves all the MDUs in both communities, and both communities are in states with laws that prohibit exclusive access agreements. Yet Verizon has not attempted to offer service in a single MDU in either of these communities, while choosing to serve wealthier communities that also happen to have fewer minorities. These *facts* cast significant doubt over suggestions that any benefits derived from prohibiting exclusive agreements will particularly affect minority households.

⁷ See *Project Lightspeed*, SBC Communications Conference Call, at 14 (Nov. 11, 2004); see also Leslie Cauley, *Cable, Phone Companies Duke It Out For Customers*, USA Today (May 22, 2005) (“During a slide show for analysts, SBC said it planned to focus almost exclusively on affluent neighborhoods. SBC broke out its deployment plans by customer spending levels: It boasted that Lightspeed would be available to 90% of its ‘high-value’ customers -- those who spend \$160 to \$200 a month on telecom and entertainment services — and 70% of its ‘medium-value’ customers, who spend \$110 to \$160 a month. SBC noted that less than 5% of Lightspeed’s deployment would be in ‘low-value’ neighborhoods -- places where people spend less than \$110 a month. SBC’s message: It would focus on high-income neighborhoods, at least initially, to turn a profit faster.”).

⁸ See *In the Matter of Telecommunications Services Inside Wiring and Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 ¶ 70 (2003).

⁹ One variant of this argument is that exclusive agreements are anti-competitive in the hands of some video providers, but not others. Marco Island Cable, for example, strongly encourages the Commission to abrogate Comcast’s exclusive agreements, despite the fact that Marco Island Cable *only* provides service to MDUs in circumstances where it is able to enter into an exclusive agreement in some form. See, e.g., Letter from Jim Baller, Counsel to Marco Island Cable, to Marlene Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 07-51 (filed Sept. 17, 2007). Marco Island Cable conveniently ignores the fact that Florida law already prohibits video service providers from entering into exclusive access agreements to serve condominium developments, see Fla. Stat. § 718.1232 (2007), and that a state court has already decided that the Comcast contracts in question are *not* exclusive access agreements. In other words, Marco Island Cable is *already* free to serve the residents in those developments if it so desires. That it chooses not to do so is not something over which Comcast has any control.

consumer effects. Numerous private cable operators (“PCOs”) and other smaller providers have come forward, demonstrating the competitive nature of the MDU marketplace.¹¹ Comcast, the Real Access Alliance, and other parties to this proceeding have provided ample evidence on the record of the substantial benefits that MDU residents receive as a result of that competition, including dedicated customer service representatives, increased investment in facilities, and, perhaps most importantly for many policymakers, substantial price discounts.¹² MVPDs large and small are only able and willing to make these substantial concessions because of the assurances that come with an exclusive agreement, won in a competitive marketplace. If it is correct that actions taken with regard to MDUs have a particular impact on households headed by minorities, it follows that these *tangible* benefits also particularly accrue to households headed by minorities. The Commission’s proposed action would wipe out all these benefits in one fell swoop.

Finally, this argument ignores the potentially deleterious effect on competition for voice and broadband services of a decision upending MDU contracts. Yet another unintended consequence of a Commission decision to abrogate existing exclusive agreements is that the wiring that is now used to provide all voice, video, and broadband Internet services will be completely turned over to the alternative video provider. If that alternative is an ILEC, or another cable operator that does not offer voice or broadband Internet, the result will be that the resident will be deprived of his or her *only* alternative for voice and broadband service in that building, purportedly in order to add *additional* options for video.¹³ Recently, Charter provided the Commission with compelling evidence that it is Verizon’s goal to seize the cable operator’s wires for this very purpose -- to eliminate competition for voice and broadband in MDUs.¹⁴ If it is correct that actions taken with regard to MDUs have a particular impact on households headed by minorities, then this loss of competitive choice for voice and broadband services will particularly affect these households. The Commission’s proposed action

¹⁰ For example, the US Telecom Association continues to use this line of argument. *See, e.g.*, Letter from Glenn Reynolds, Vice President, US Telecom Association, to Marlene Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 07-51 (filed Oct. 18, 2007). It is unclear what facts it cites to when it makes these arguments in its ex parte meetings. The only facts on the record are the declarations attached to the comments submitted by the Real Access Alliance, in which executives of four major real estate developers *swear under oath* that in their experience there has not been a recent increase in the number of exclusives, refuting the notion that existing operators are aggressively seeking MDU exclusives in an effort to forestall competition. *See, e.g.*, Comments of Real Access Alliance (“RAA Comments”), MB Dkt. 07-51, at Exhibit C, ¶ 5 (filed July 2, 2007) (“In my experience, we have not witnessed any increase in requests for [exclusive] agreements from video service providers in recent times.”).

¹¹ Some of these operators have even said that they do not, and cannot, provide service in buildings where they cannot obtain an exclusive access agreement. *See, e.g.*, Letter of Mr. Paul Savoldelli, CEO, DirecPath, to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Dkt. 07-51 (filed Aug. 6, 2007).

¹² *See, e.g.*, Reply Comments of Comcast Corporation, MB Dkt. No. 07-51, at 3-5 (filed Aug. 1, 2007); Comments of the Community Associations Institute, MB Dkt. No. 07-51, at 5, 7 (filed July 2, 2007); RAA Comments at 17.

¹³ *See, e.g.*, Comments of Comcast Corporation, MB Dkt. 07-51, at 6-10 (filed July 2, 2007).

¹⁴ *See, e.g.*, Letter from Megan M. Delany, Charter Communications, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 07-51, at 3 (filed Oct. 16, 2007).

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would significantly set back competition in the voice marketplace, and harm the deployment of broadband to minority households. Both results would be inimical to the Commission's stated public interest goals.

The record in this proceeding is replete with evidence that exclusive access agreements can have significant benefits for consumers who reside in MDUs, regardless of race or financial status. Comcast shows its commitment to provide competitive choice to minority households by actually serving them. These households already benefit from the service choices and cost savings that Comcast offers, as well as the undeniable existence of substantial marketplace competition. It would not be in the public interest to eliminate these consumer benefits, while at the same time delivering the consumer detriments outlined above.

Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

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